Supreme Court, U.S.
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No. 96-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

EDISON M. FURTICK, JR.,
Petitioner,

v.

WILLIAM SHULTS, CONTRACTOR AND
EXECUTIVE RISK CONSULTANTS, INC.,
Respondents.

Petition for Writ of Certiorari to the District Court of Appeal, First District, State of Florida

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an administrative agency of the State of Florida may exercise personal jurisdiction over a doctor in South Carolina who has rendered treatment to a South Carolina resident injured in Florida, where the doctor's only contacts with Florida are the receipt of compensation for, and telephone calls about, his services from a Florida Workers' Compensation insurance carrier.

2. Whether, consistent with the Due Process Clause of the Fourteenth Amendment, a Florida insurance carrier can unilaterally subject a South Carolina physician to state administrative utilization review procedures, to reduce payments owed to the doctor, without giving him notice, or informing him of the procedures being invoked, or advising him he has certain rights to challenge the utilization review and reduction.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Edison M. Furtick, Jr., respectfully petitions for a Writ of Certiorari to review the judgment and opinion of the District Court of Appeal, First District, State of Florida.

OPINIONS BELOW

The opinion of the District Court of Appeal, First District, State of Florida, filed November 16, 1995, is officially reported at 664 So. 2d 288 (Fla. Dist. Ct. App. 1995), and is reproduced in Appendix A to this Petition at pages 1a to 4a. The order of the Florida Supreme Court declining to exercise discretionary jurisdiction over this case appears in Appendix D to this Petition, at page 13a.

JURISDICTION

The opinion and judgment of the District Court of Appeal, First District, State of Florida, was entered November 16, 1995 (App. 1a), and motions for rehearing and/or clarification, rehearing en banc, and certification were denied December 21, 1995. (App. 5a). A petition for writ of certiorari was then filed with the Florida Supreme Court. The Florida Supreme Court denied the petition April 8, 1996, and no motions for rehearing were allowed. (App. 13a). This petition was, therefore, timely filed within ninety (90) days of that final judgment. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment XIV, Section 1:

> ". . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . ."

Florida Statutes (1993):

> The state statutes at issue are the Florida Long-Arm Statute and a section of the Florida Workers' Compensation Statute. Sections 48.193 and 440.13, *Florida Statutes,* are lengthy, and appear in Appendix F to this Petition at pages 16a and 18a, respectively.

STATEMENT OF THE CASE

The Petitioner, Edison M. Furtick, Jr., resides in South Carolina, and is a carpenter by trade. In 1985, he injured his back while working on a construction site in Florida, and sought medical treatment through the State of Florida's Workers' Compensation System. His claim was accepted as compensable by the Respondents, and treatment was rendered. In 1991, when Mr. Furtick moved to South Carolina, the continuing pain of his injury required him to seek further medical treatment from Raleigh L. Phillips, D.C., in Hilton Head Island, South Carolina.

The Florida insurance carrier, Respondent Executive Risk Consultants, Inc., approved of Mr. Furtick's choice of doctors and authorized treatment. (App. 8a). However, before beginning treatment, Dr. Phillips required Mr. Furtick to sign a note promising payment for any costs not covered by insurance. Treatment ran from October of 1991 to the present and continues today.

At first, the Florida insurance carrier paid the bills submitted by Dr. Phillips' office. But as treatment continued, the carrier reduced payments to Dr. Phillips, and eventually stopped paying altogether. As discussed below, no explanation was given for the reduction in payments. Dr. Phillips, unaware of the reasons for the reduced payments and unaware of any opportunity to administratively challenge them, merely sent the Florida insurance carrier amended bills, and thereby waived his right to timely contest the carrier's actions under the Division of Workers' Compensation rules. As a result of the carrier's refusal to pay the doctor's bills, on October 15, 1992, Mr. Furtick filed a Claim of Benefits with the Judge of Compensation Claims pursuant to the Florida Workers' Compensation Act, seeking payment of authorized remedial, palliative medical care and treatment.

Mr. Furtick's claim argued that the carrier's refusal to pay Dr. Phillips amounted to an unlawful "unilateral deauthorization" of his treatment. The carrier argued that this was not a case involving "unilateral deauthorization" but rather an instance of "overutilization," whereby allegedly excessive and unnecessary medical charges can be reduced through an administrative process.[1]

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[1] In Florida, Judges of Compensation Claims review matters concerning unilateral deauthorization (e.g., a carrier refuses to honor bills submitted by a treating physician). On the other hand, overutilization issues (e.g., excessive bills or bills for unnecessary treatment) are within the jurisdiction of the State of Florida. This dichotomy is discussed in the opinion of the Florida court. (App. 3a).

At hearing, Mr. Furtick argued through counsel that the State of Florida, Division of Workers' Compensation, policy manual explicitly exempts out-of-state providers from utilization review procedures, and that in any event, the Division of Workers' Compensation could not exercise jurisdiction over Dr. Phillips given his lack of minimum contacts with the State of Florida. Dr. Phillips' contacts with Florida included: (1) the treatment of an individual injured in Florida, who later travelled to his offices in South Carolina; (2) the receipt of checks from a Florida insurance carrier for services rendered; and (3) the exchange of telephone calls with the insurance carrier when payments were unilaterally reduced and later withheld.

Mr. Furtick also established at hearing that the insurance carrier and the Division of Workers' Compensation did not provide Dr. Phillips with copies of, or even citation to, relevant statutes, rules and policies. (App. 73a). The hearing also established that the state agency has a policy of not providing information about Florida's Workers' Compensation rules and policies unless specifically asked. The supervisor of utilization review summarized the agency's attitude towards out-of-state health care providers by stating, "they'd better learn the laws." (App. 74a).

The Judge of Compensation Claims found that he did not have jurisdiction to entertain Petitioner's constitutional due process arguments, and that the Florida Division of Workers' Compensation had exclusive jurisdiction over the matter. (App. 10a). The Judge of Compensation Claims then dismissed Mr. Furtick's petition. (App. 6a). Mr. Furtick then appealed to the Florida First District Court of Appeal, arguing, in relevant part, that the exercise of jurisdiction over a non-resident doctor violated due process given (1) the absence of sufficient minimum contacts with the forum State and (2) the complete lack of notice given to the doctor. (App. 46a-53a). The Florida appellate court affirmed the decision of the Judge of Compensation

Claims, stating in a single sentence that Dr. Phillips was subject to the administrative procedures in Section 440.13, *Florida Statutes*. (App. 1a-2a). Aside from this single sentence, the Florida court did not address any of Petitioner's due process arguments.

Mr. Furtick then sought review by the Florida Supreme Court, but was unable to invoke its discretionary jurisdiction. This appeal followed.

REASONS FOR GRANTING THE PETITION

The decision of the Florida appellate court decides an important federal question in a manner that conflicts with decisions of this Court and those of other federal courts. The State of Florida has taken the position that it may validly adjudicate the rights of absent, out-of-state health care providers, *even without providing notice* that binding administrative procedures are being invoked, and *even in the absence of minimum contacts* between the doctors and the State of Florida. The record shows that the State of Florida makes a policy of this practice. (*See, e.g.*, App. 73a). Therefore, all workers injured in Florida and covered by the state's Workers' Compensation laws are effectively roving emissaries of *in personam* State jurisdiction. Merely through the chance visit of a claimant injured in Florida, and the acceptance of a check from a Florida insurance carrier, an out-of-state physician may have his or her property rights determined administratively in Florida—including determinations about the quality of the care rendered, its necessity, and the physician's right to compensation.

Since this practice by the State of Florida conflicts with previous opinions of this Court and those of other federal courts, this Petition presents an appropriate candidate for a writ of certiorari. *See* Rule 10(b), (c), S. Ct. Rules (listing conflict as one possible basis for discretionary review).

Given the nation-wide effect of this policy of the Florida agency, this Petition presents an appropriate means for the

Court to revisit the procedural due process principles noted as early as *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S. Ct. 154, 90 L.Ed 95 (1945), and in subsequent opinions. This case affects and concerns not only Dr. Phillips, but all out-of-state physicians treating individuals covered by Florida's Workers' Compensation System. Just like Dr. Phillips, the physicians have no practical means of influencing Florida's policies and laws. They are forced to bear a significant financial burden to defend against utilization review in a foreign jurisdiction. Accordingly, this grave situation requires prompt instruction from this Court to preserve the important individual liberty interests of Dr. Phillips, and every other out-of-state physician providing medical care to Florida's injured workers.

I. FLORIDA'S EXERCISE OF JURISDICTION OVER A NON-RESIDENT DOCTOR VIOLATES DUE PROCESS, IN CONFLICT WITH OPINIONS OF THIS COURT

This Court has consistently recognized in the Due Process Clause [2] an individual liberty interest in not being subjected to the binding judgments of a foreign State with which he or she has established no meaningful "contacts, ties, or relations." *International Shoe Co.,* 326 U.S. at 319, 66 S. Ct. at 160; *see also Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 702-03 n.10, 102 S. Ct. 2099, 2105-05 n.10, 72 L.Ed.2d 492 (1982) (recognizing this right as an individual liberty interest rather than a function of federalism).

This Court has measured the extent of this liberty interest by reference to the "fair warning" given the individual "that a particular activity may subject [them] to the jurisdiction of a foreign sovereign." *Burger King*

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[2] "No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . ." U.S. Const. Amend. XIV, § 1.

Corp. v. Rudzewicz, 471 U.S. 462, 472, 105 S. Ct. 2174, 2182, 85 L.Ed.2d 528 (1985) (quoting Justice Stevens' concurring opinion *Shaffer v. Heitner,* 433 U.S. 186, 218, 97 S. Ct. 2559, 2587, 53 L.Ed.2d 683 (1977)). Absent a "fair warning" to the non-resident, the forum state may validly exercise jurisdiction only if the individual has "purposely directed" activities at the resident of the forum state, *e.g., Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770, 774, 104 S. Ct. 1473, 1478, 79 L.Ed.2d 790 (1984), but then only to the extent the asserted jurisdiction concerns matters "aris[ing] out of or relat[ing] to" those activities. *Helicopteros Nacionales de Columbia, S.A. v. Hall,* 466 U.S. 408, 414, 104 S. Ct. 1868, 1872, 80 L.Ed.2d 404 (1984). Often, these directed activities are referred to as "minimum contacts" with the forum state, *e.g., International Shoe,* 326 U.S. at 316, 66 S. Ct. at 158, though more recent opinions have characterized the inquiry in terms of "purposeful availment" of the benefits and protections of the forum State. *See, e.g., Burger King Corp.,* 471 U.S. at 475, 105 S. Ct. at 2183 (citing *Keeton,* 465 U.S. at 774, 104 S. Ct. at 1478, and *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 299, 100 S. Ct. 559, 568, 62 L.Ed.2d 490 (1980)).

A. The Unilateral Activity of Others Cannot Subject One To A State's Jurisdiction

The exercise of Florida administrative jurisdiction over a South Carolina health care provider effectively defines "purposeful availment" in terms of a new, lower threshold, in direct conflict with previous opinions of this Court.

First, by treating a South Carolina resident injured in Florida, Dr. Phillips has in no way "submit[ted] himself . . . to the jurisdiction" of Florida's administrative agencies. § 48.193(1), Fla. Stat. (1993) (Florida's long-arm statute). This Court has elsewhere recognized that "[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the require-

ment of contact with the forum State." *Hanson v. Denckla,* 357 U.S. 235, 253, 78 S. Ct. 1228, 1239-40, 2 L.Ed.2d 1283 (1958). Thus, State jurisdiction cannot validly extend to an automobile distributor whose only tie to the forum state arises from a customer's decision to drive there, *World-Wide Volkswagen Corp., supra;* a divorced wife cannot sue her former husband in any state she decides to settle in, *Kulko v. California Superior Court,* 436 U.S. 84, 98 S. Ct. 1690, 56 L.Ed.2d 132 (1978); and a settlor's unilateral exercise of her power of appointment in a chosen State does not make a foreign trustee amenable to suit, *Hanson v. Denkla, supra.*

It would, therefore, follow that the actions of Mr. Furtick, a South Carolina resident seeking medical care in South Carolina for an injury obtained in Florida, merely represent the "unilateral activity of another party or a third person," *Helicopteros Nacionales de Columbia,* 466 U.S. at 417, 104 S. Ct. at 1873, and cannot constitute a basis for Florida to assert administrative jurisdiction over Dr. Phillips.

B. Litigation in Florida Was Not Foreseeable

Second, even if the inquiry were framed in terms of "minimum contacts," the State of Florida's exercise of jurisdiction over Dr. Phillips represents a purely random, fortuitous event. In such an inquiry, this Court has often considered whether the exercise of *in personam* jurisdiction was at all foreseeable—that is, whether "the defendant's conduct and connection with the forum State [is] such that he should reasonably anticipate being haled into court there." *Burger King Corp.,* 471 U.S. at 474, 105 S. Ct. at 2183 (quoting *World-Wide Volkswagen,* 444 U.S. at 295, 100 S. Ct. at 566).

Whether one should reasonably anticipate the exercise of a State's jurisdiction over him "var[ies] with the quality and nature of the . . . activity," *Hanson,* 357 U.S. at 253,

78 S. Ct. at 1239. Therefore, each case presented to this Court contains a unique set of facts to which the constitutional principles of due process must be applied. However, a finding that Florida's administrative control of Dr. Phillips' medical care was "foreseeable"—merely because Dr. Phillips received a few checks from a Florida insurance carrier and exchanged a few telephone calls—clearly conflicts with numerous opinions of this Court and other federal courts.

The proceedings below demonstrated that Dr. Phillips has not engaged in significant activities within the State of Florida. (App. 48a). He does not solicit the business of injured Florida workers, or even workers injured in Florida. (App. 48a). Indeed, there is no record indication that he ever visited Florida at any time. *Cf. Burnham v. Superior Court,* 495 U.S. 604, 110 S. Ct. 2105, 109 L.Ed.2d 631 (1990) (transient jurisdiction permissible); *Burger King Corp.,* 471 U.S. at 476, 105 S. Ct. at 2184 (noting physical presence in state may enhance the forum's jurisdictional claim over the individual). Since Dr. Phillips has not engaged in significant activities with Florida, *Keeton,* 465 U.S. at 648, 104 S. Ct. at 1481, and otherwise has no "continuing obligations" with the State, *Travelers Health Ass'n v. Virginia,* 339 U.S. 643, 648, 70 S. Ct. 927, 929, 94 L.Ed.2d 1154 (1950), one would expect that Florida could not exercise jurisdiction over him.

Indeed, the opinions of this Court indicate that limited activities—such as depositing checks mailed by a Florida insurance carrier and telephoning the carrier—merely represent "some single or occasional act" presenting at best an "attenuated" affiliation with Florida. *See International Shoe Co.,* 326 U.S. at 318, 66 S. Ct. at 159; *World-Wide Volkswagen Corp.,* 444 U.S. at 299, 100 S. Ct. at 568. Because these acts represented isolated contact with Florida, "the reasonable foreseeability of litigation in the forum [was] substantially diminished." *Bur-*

ger King Corp., 471 U.S. at 475 n.18, 105 S. Ct. at 2184 n.18.

The few opinions from Federal Appellate Courts that contain similar facts seem to agree. *E.g., Stover v. O'Connell Assocs.*, 84 F.3d 132 (4th Cir. 1996) (telephone call insufficient contact to support jurisdiction); *Holt Oil & Gas Corp v. Harvey*, 801 F.2d 773 (5th Cir. 1986) (three checks, telephone calls and written communication held insufficient contacts with forum state), *cert. denied*, 481 U.S. 1015 (1987); *CPC-Rexcell, Inc. v. Ia Corona Foods, Inc.*, 912 F.2d 241 (8th Cir. 1990) (contractual communications via telephone and telefax did not bring buyer under state's long-arm statute); *Wolf-Tec, Inc. v. Miller's Sausage Co., Inc.*, 899 F.2d 727 (8th Cir. 1990) (telephone contacts not enough); *Webb v. Sitzes*, 82 F.3d 424, 1996 WL 169298 (9th Cir. 1996) (mailing of letters, acceptance of retainer and telephone calls insufficient contacts); *Davis v. American Family Mut. Ins. Co.*, 861 F.2d 1159 (9th Cir. 1988) (telephone and mail contact with forum for a single insurance claim not enough); *Rambo v. American Southern Ins. Co.*, 839 F.2d 1415 (10th Cir. 1988) (employment of non-resident to repair property in forum state did not support jurisdiction); *see also Sunbelt Corp. v. Noble, Denton & Assocs., Inc.*, 5 F.3d 28 (3d Cir. 1993) (contract alone does not automatically establish minimum contacts); *Afram Export Corp. v. Metallugiki Halyps, S.A.*, 772 F.2d 1358 (7th Cir. 1985) (single contract for mail order goods insufficient contact with forum). Under these opinions, and this Court's past holdings, the carrier's invocation of Florida administrative procedures—all without notice to Dr. Phillips—was completely unforeseeable, given these attenuated contacts.

II. THE FLORIDA INSURANCE CARRIER AND THE STATE OF FLORIDA HAVE FAILED TO GIVE "FAIR WARNING" OR SUFFICIENT NOTICE TO THE NON-RESIDENT

A second basis for granting this Petition stems from the complete lack of notice given to Dr. Phillips. As noted above, numerous opinions from this Court allow States to meet the individual liberty requirement of the Due Process Clause by providing a simple "fair warning" to the individual "that a particular activity may subject [them] to the jurisdiction of a foreign sovereign." *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 472, 105 S. Ct. 2174, 2182, 85 L.Ed.2d 528 (1985) (quoting Justice Stevens' concurring opinion in *Shaffer v. Heitner,* 433 U.S. 186, 218, 97 S. Ct. 2559, 2587, 53 L.Ed.2d 683 (1977)).

Here, none was given. As noted, the State of Florida has a stated policy of not providing *any* references to statutes, rules and procedures unless specifically asked. (App. 73a). The absence of notice was carefully documented at hearing, as shown in counsel's questioning of the Division's representative in charge of utilization review:

> Q: So in other words, unless they told [Dr. Phillips] during that first forty-five day period that he had sixty days to respond after that forty-five day period, they—he had no idea what he was supposed to do.
>
> A: Probably not. Unless he had read the reimbursement manual or the rules.
>
> Q: And is there anything in your rules that require carriers to provide out-of-state physicians with copies of the reimbursement manual?
>
> A: Not at this time.
>
> Q: Is there anything in your rules that requires carriers to provide out-of-state physicians supplying services with copies of even the rules of the Division?
>
> A: Not at this time.

(App. 73a). Without providing copies of the manual, without providing copies of the rules, *and without even giving notice that these materials exist,* the Division's attitude toward out-of-state doctors was best summarized by the agency supervisor's statement: "they'd better learn the laws." (App. 74a).

In order to meet a constitutional minimum, this Court has always required better notice than this. *E.g., Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 70 S. Ct. 652, 94 L.Ed. 865 (1950) (notice is essential to due process). The failure to provide Dr. Phillips the rules of the game—or even tell him that they were available upon request—or advise him that certain procedures will be invoked against him by an insurance carrier—is simply not fair. At the very least, the lack of notice to Dr. Phillips does not create the "degree of predictability to the legal system" that the Due Process Clause requires, in order that potential defendants may structure their conduct to avoid litigation. *Burger King Corp.,* 471 U.S. at 472, 105 S. Ct. at 2182. Thus, the holding of the Florida appellate court that Dr. Phillips was nonetheless subject to the State's administrative review procedures conflicts with past opinions of this Court.

Dr. Phillips, a resident of South Carolina, has no ability to influence Florida's policies or seek legislative or administrative redress. These factors alone suggest that this Court should exercise its discretionary jurisdiction and grant Mr. Furtick's Petition. The national growth of workers' compensation claims, the transient nature of our society, "modern transportation and communications," *McGee v. International Life Ins. Co.,* 355 U.S. 220, 223, 78 S. Ct. 199, 201, 2 L.Ed.2d 223 (1957), and Florida's insistence on a policy of jurisdiction-without-notice (App. 73a), suggest an urgency in Dr. Phillips' plight.

CONCLUSION

For the reasons stated, Mr. Furtick's Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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